



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R04-OAR-2017-0371; FRL-9966-47-Region 4]

Air Plan Approval; Alabama: PSD Replacement Units

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: The Environmental Protection Agency (EPA) is approving a portion of Alabama's State Implementation Plan (SIP) revision submitted by the State of Alabama, through the Alabama Department of Environmental Management (ADEM), on May 7, 2012. The portion of the revision that EPA is approving relates to the State's Prevention of Significant Deterioration (PSD) permitting regulations. In particular, the revision adds a definition of "replacement unit" and provides that a replacement unit is a type of existing emissions unit under the definition of "emissions unit." This action is being taken pursuant to the Clean Air Act (CAA or Act).

DATES: This direct final rule is effective [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER] without further notice, unless EPA receives adverse comment by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. If EPA receives such comments, it will publish a timely withdrawal of the direct final rule in the Federal Register and inform the public that the rule will not take effect.

ADDRESSES: Submit your comments, identified by Docket ID No EPA-R04-OAR-2017-0371 at <http://www.regulations.gov>. Follow the online instructions for submitting comments. Once

submitted, comments cannot be edited or removed from Regulations.gov. EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (i.e., on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit <http://www2.epa.gov/dockets/commenting-epa-dockets>.

FOR FURTHER INFORMATION CONTACT: Andres Febres of the Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. Mr. Febres can be reached by telephone at (404) 562-8966 or via electronic mail at febres-martinez.andres@epa.gov.

SUPPLEMENTARY INFORMATION:

I. What Action is the Agency Taking?

On May 7, 2012, ADEM submitted a SIP revision for EPA's approval that includes, among other things, changes to Alabama's PSD permitting regulations as part of the State's New Source Review (NSR) permitting program.¹ The NSR program, established in parts C and D of

¹ EPA's regulations governing the implementation of NSR permitting programs are contained in 40 CFR 51.160 - 51.166; 52.21, 52.24; and part 51, appendix S. The CAA NSR program is composed of three separate programs: PSD, NNSR, and Minor NSR. PSD is established in part C of title I of the CAA and applies in areas that meet the NAAQS – "attainment areas" – as well as areas where there is insufficient information to determine if the area meets the NAAQS – "unclassifiable areas." The NNSR program is established in part D of title I of the CAA and applies in areas that are not in attainment of the NAAQS – "nonattainment areas." The Minor NSR program addresses

title I of the CAA and EPA's implementing regulations at 40 CFR 51.165, 40 CFR 51.166, and 40 CFR 52.21, is a preconstruction review and permitting program applicable to new major stationary sources of regulated NSR pollutants and major modifications at existing major stationary sources. A major modification is defined as any physical change in or change in the method of operation of a major stationary source that would result in a significant emissions increase of a regulated NSR pollutant and a significant net emissions increase of that pollutant from the major stationary source. *See* 40 CFR 51.165(a)(1), 51.166(b)(2)(i), and 52.21(b)(2)(i).

In this document, EPA is taking direct final action to approve the portions of this submittal that make changes to ADEM Administrative Code Rule 335-3-14-.04 - "Air Permits Authorizing Construction in Clean Air Areas [Prevention of Significant Deterioration Permitting (PSD)]." Alabama's May 7, 2012, SIP submittal changes the PSD regulations at Rule 335-3-14-.04 by adding a definition of "replacement unit" and by modifying the definition of "emissions unit" to expressly include replacement units as existing emissions units. As revised in the May 5, 2017, withdrawal letter discussed in Section III, below, these changes are similar to those made to the Federal PSD regulations at 40 CFR 52.21(b)(7) and (33) in the rule titled "Prevention of Significant Deterioration (PSD) and Non-Attainment New Source Review (NSR): Reconsideration" *See* 68 FR 63021 (November 7, 2003) (hereinafter referred to as the NSR Reform Reconsideration Rule).

EPA is not taking action on the portions of Alabama's May 7, 2012, submittal regarding ADEM Administrative Code Chapter 335-3-10 - "Standards of Performance for New Stationary Sources," and Chapter 335-3-11 - "National Emission Standards for Hazardous Air Pollutants." In the submittal, Alabama acknowledges that these regulations are not part of Alabama's SIP and

construction or modification activities that do not qualify as "major" and applies regardless of the designation of the area in which a source is located. Together, these programs are referred to as the NSR programs.

states that the “revisions to these [regulations] are not proposed to be incorporated into Alabama’s SIP.”

II. Background

A. NSR Reform

On December 31, 2002, EPA published final rule revisions to the CAA’s PSD and Nonattainment New Source Review (NNSR) programs. *See* 67 FR 80186 (hereinafter referred to as the 2002 NSR Rule). The revisions included several major changes to the NSR program, including the addition of an actual-to-projected-actual emissions test for determining NSR applicability for existing emissions units.

Following publication, EPA received numerous petitions requesting reconsideration of several aspects of the final rule. On July 30, 2003 (68 FR 44624), EPA granted reconsideration on six issues, including whether replacement units should be allowed to use the actual-to-projected-actual applicability test to determine whether installing a replacement unit results in a significant emissions increase. On November 7, 2003, EPA published the NSR Reform Reconsideration Rule. *See* 68 FR 63021. In the reconsideration rule, EPA continued to allow the owner or operator of a major stationary source to use the actual-to-projected-actual applicability test to determine whether installing a replacement unit results in a significant emissions increase. EPA also modified the rules by: 1) adding a definition of “replacement unit,” and 2) revising the definition of “emissions unit” to clarify that a replacement unit is considered an existing emissions unit and therefore is eligible for the actual-to-projected-actual test for major NSR applicability determinations. The 2002 NSR Rule and the NSR Reform Reconsideration Rule are hereinafter collectively referred to as the “2002 NSR Reform Rules.”

B. Equipment Replacement Provision

Under Federal regulations, certain activities are not considered to be a physical change or a change in the method of operation at a source, and thus do not trigger NSR review. One category of such activities is routine maintenance, repair and replacement (RMRR). On October 27, 2003, EPA published a rule titled “Prevention of Significant Deterioration (PSD) and Non-Attainment New Source Review (NSR): Equipment Replacement Provision of the Routine Maintenance, Repair and Replacement Exclusion” (hereinafter referred to as the ERP Rule). *See* 68 FR 61248. The ERP Rule provided criteria for determining whether an activity falls within the RMRR exemption. The ERP Rule provided a list of equipment replacement activities that are exempt from NSR permitting requirements, while ensuring that industries maintain safe, reliable, and efficient operations that will have little or no impact on emissions. Under the ERP Rule, a facility undergoing equipment replacement would not be required to undergo NSR review if the facility replaced any component of a process unit with an identical or functionally equivalent component. The rule included several modifications to the NSR rules to explain what would qualify as an identical or functionally equivalent component.

Shortly after the October 27, 2003 rulemaking, several parties filed petitions for review of the ERP Rule in the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit). The D.C. Circuit stayed the effective date of the rule pending resolution of the petitions. A collection of environmental groups, public interest groups, and States, subsequently filed a petition for reconsideration with EPA, requesting that the Agency reconsider certain aspects of the ERP Rule. EPA granted the petition for reconsideration on July 1, 2004. *See* 69 FR 40278.²

² The reconsideration granted by EPA opened a new 60-day public comment period, and carried out a new public hearing, only on three issues of the ERP. These three issues included: (1) The basis for determining that the ERP was allowable under the CAA; (2) The basis for selecting the cost threshold (20 percent of the replacement cost of the process unit) that was used in the final rule to determine if a replacement was routine; and (3) A simplified procedure for incorporating a Federal Implementation Plan into State Plans to accommodate changes to the NSR rules.

After the reconsideration, EPA published its final response on June 10, 2005, which stated that the Agency would not change any aspects of the ERP. *See* 70 FR 33838 (June 10, 2005). On March 17, 2006, the D.C. Circuit acted on the petitions for review and vacated the ERP Rule.³

III. Analysis of the State's Submittal

Alabama's May 7, 2012, SIP revision makes changes to the State's PSD permitting regulations by adding a definition of "replacement unit" at Rule 335-3-14-.04(2)(bbb) and by modifying the definition of "emissions unit" at Rule 335-3-14-.04(2)(g) to expressly include replacement units as existing emissions units. As of the date of the submittal, these changes were intended to reflect revisions to the Federal regulations regarding replacement units included in the NSR Reform Reconsideration Rule and to reflect revisions regarding functionally equivalent components in the ERP Rule, as described in Sections II.A and II.B of this action, above.

The SIP revision initially sought to add a definition of "replacement unit" at Rule 335-3-14-.04(2)(bbb) that combined the Federal definition of "replacement unit" with language concerning functionally equivalent units and basic design parameters from the ERP Rule. However, the ERP Rule was vacated by the D.C Circuit following the submittal of Alabama's SIP revision. Accordingly, on May 5, 2017, Alabama submitted a letter to EPA withdrawing, among other things, portions of the definition of "replacement unit" from its May 7, 2012, SIP revision that incorporated language from the ERP Rule with the exception of one sentence in subparagraph (bbb)(3) that provides an example of a "basic design parameter" as it relates to a replacement unit. EPA has evaluated this sentence, and the Agency believes that it is simply an illustrative example and that Alabama's provisions relating to RMRR remain consistent with

³ *New York v. EPA*, 443 F.3d 880 (D.C. Cir. 2006)

Federal provisions and the CAA regarding RMRR. Pursuant to the withdrawal letter, the text of Rule 335-3-14-.04(2)(bbb)(3) for incorporation into the SIP reads as follows:

Replacement unit means an emissions unit for which all the criteria listed in subparagraphs (2)(bbb)1. through 4. of this section are met. No creditable emission reductions shall be generated from shutting down the existing emissions unit that is replaced. A replacement unit is subject to all permitting requirements for modifications under this rule.

1. The emissions unit is a reconstructed unit within the meaning of 40 CFR §60.15(b)(1), or the emissions unit completely takes the place of an existing emissions unit.
2. The emissions unit is identical to or functionally equivalent to the replaced emissions unit.
3. The replacement does not alter the basic design parameters of the process unit. Basic design parameters of a replaced unit shall also include all source specific emission limits and/or monitoring requirements.
4. The replaced emissions unit is permanently removed from the major stationary source, otherwise permanently disabled, or permanently barred from operation by a permit that is enforceable as a practical matter. If the replaced emissions unit is brought back into operation, it shall constitute a new emissions unit.

In Rule 335-3-14-.04(2)(g), Alabama revises the definition of “Emissions Unit” by adding a new sentence at subparagraph (g)(2) that expressly includes replacement units as existing emissions units. This sentence references the new definition of “replacement unit” at Rule 335-3-14-.04(2)(bbb), as presented above, and is consistent with the Federal definition of the term “replacement unit” at 40 CFR 52.21(b)(33). EPA has concluded that adding this change and Rule 335-3-14-.04(2)(bbb) to the SIP will not interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 171), or any other applicable requirement of the CAA.

IV. Incorporation by Reference

In this rule, the EPA is finalizing regulatory text that includes incorporation by reference.

In accordance with requirements of 1 CFR 51.5, EPA is finalizing the incorporation by reference of ADEM Administrative Code Rules 335-3-14-.04(2)(g) and 335-3-14-.04(2)(bbb), state effective on May 29, 2012. EPA has made, and will continue to make, these materials generally available through www.regulations.gov and/or at the EPA Region 4 Office (please contact the person identified in the “For Further Information Contact” section of this preamble for more information).

Therefore, these materials have been approved by EPA for inclusion in the State implementation plan, have been incorporated by reference by EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of EPA’s approval, and will be incorporated by reference by the Director of the Federal Register in the next update to the SIP compilation.⁴

V. Final Action

EPA is taking direct final action to approve the portions of Alabama’s May 7, 2012, SIP submittals, as revised via the State’s May 5, 2017 withdrawal letter, that modify Rule 335-3-14-.04(2)(g) and add Rule 335-3-14-.04(2)(bbb), as described above. This action is limited to the two rule revisions currently before the Agency and does not modify any other PSD rules in Alabama’s SIP.

EPA is approving the aforementioned changes to the SIP without prior proposal because the Agency views this as a noncontroversial submittal and anticipates no adverse comments. However, in the proposed rules section of this Federal Register publication, EPA is publishing a separate document that will serve as the proposal to approve the SIP revision should adverse comments be filed. This rule will be effective **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]** without further notice unless the Agency

⁴ 62 FR 27968 (May 22, 1997).

receives adverse comments by **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

If EPA receives such comments, then EPA will publish a document withdrawing the final rule and informing the public that the rule will not take effect. All adverse comments received will then be addressed in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period. Parties interested in commenting should do so at this time. If no such comments are received, the public is advised that this rule will be effective on **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]** and no further action will be taken on the proposed rule.

Please note that if we receive adverse comment on an amendment, paragraph, or section of this rule and if that provision may be severed from the remainder of the rule, we may adopt as final those provisions of the rule that are not the subject of an adverse comment.

VI. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. *See* 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely approves state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);

- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175

(65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. Parties with objections to this direct final rule are encouraged to file a comment in response to the parallel notice of proposed rulemaking for this action published in the proposed rules section of this Federal Register, rather than file an immediate petition for judicial review of this direct final rule, so that EPA can withdraw this direct final rule and address the comment in the proposed rulemaking. This action may not be challenged later in proceedings to enforce its requirements. See section 307(b)(2).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: August 7, 2017.

V. Anne Heard,
Acting Regional Administrator,
Region 4.

40 CFR part 52 is amended as follows:

PART 52--APPROVAL AND PROMULGATION OF PLANS

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart B - Alabama

2. Section 52.50(c) is amended under “Chapter No. 335-3-14 Air Permits” by revising the entry for “Section 335-3-14-.04” to read as follows:

§ 52.50 Identification of plan.

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(c) * * *

EPA Approved Alabama Regulations

State citation	Title/subject	State effective date	EPA approval date	Explanation
**	**	*	*	*
Chapter No. 335-3-14 Air Permits				

Section 335– 3–14–.04	Air Permits Authorizing Construction in Clean Air Areas [Prevention of Significant Deterioration Permitting (PSD)]	5/29/2012	[Insert date of publication in <u>Federal Register</u>] [Insert citation of publication]	As of [Insert date of publication in <u>Federal Register</u>] Section 335-3-14- .04 does not include Alabama’s revision to adopt the PM _{2.5} SILs threshold and provisions (as promulgated in the October 20, 2010 PM _{2.5} PSD Increment-SILs- SMC Rule at 40 CFR 1.166(k)(2) and the term “particulate matter emissions” (as promulgated in the May 16, 2008 NSR PM _{2.5} Rule (at 40 CFR 51.166(b)(49)(vi)).
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[FR Doc. 2017-17342 Filed: 8/23/2017 8:45 am; Publication Date: 8/24/2017]